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# Violence and Abuse of Older People - A review of current proposals for criminalisation

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## Summary

An increase in research addressing violence and abuse of older people has been met with calls to formally recognise and respond to 'elder abuse', either through the introduction of specific criminal offences or by widening the hate crime framework to include older age. This paper offers a critical review of these proposals and argues that, ultimately, neither will achieve the primary objectives of reducing violence and abuse of older people and improving prosecution and conviction rates.

## Introduction

The recent increase in empirical evidence regarding crime and abuse of older people<sup>1</sup> has been met with a growing demand to respond to that phenomenon, and an increasing number of cases reported in the media<sup>2</sup> have bolstered the calls for Parliament to respond through new legislation. Elsewhere, most notably the USA, elder abuse has been placed on a statutory footing and there have been calls to adopt a similar approach in the UK<sup>3</sup>. There are currently two main proposals put forward by lobbyists and campaign groups: introducing one or more specific 'elder abuse' offences; and extending current hate crime legislation to incorporate older age as a protected characteristic. This paper will examine both proposals, evaluating them based on the available evidence, and ultimately argue that their underlying aims are better addressed through policy and practice reforms rather than new legislative measures.

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<sup>1</sup> See *Commissioner for Older People for Northern Ireland, 'Crime and Justice: The Experience of Older People in Northern Ireland'* 2019 available at <https://www.copni.org/media/1540/206567-online-a4-crime-report-56p.pdf> (accessed 13 May 2020); see J. Lonsdale, D. Schweppenstedde, L. Strang, M. Stepanek and K. Stewart, *National Trading Standards — Scams Team Review*. (2016) Cambridge: RAND Europe. Available at: [https://www.rand.org/pubs/research\\_reports/RR1510.html](https://www.rand.org/pubs/research_reports/RR1510.html) (accessed 13 May 2020); V. Sivarajasingam, D.J.J. Farnell, S. Moore, N. and J.P. Shepherd, "Violence in England and Wales in 2016: An Accident and Emergency Perspective" (Cardiff: Cardiff University, 2016). Available at: [https://www.cardiff.ac.uk/\\_data/assets/pdf\\_file/0009/734904/Violence-in-England-and-Wales-in-2016.pdf](https://www.cardiff.ac.uk/_data/assets/pdf_file/0009/734904/Violence-in-England-and-Wales-in-2016.pdf) (accessed 12 May 2020); H. Bows, "Domestic Homicide of Older People (2010–15): A Comparative Analysis of Intimate-Partner Homicide and Parricide Cases in the UK" (2019) 49 *British Journal of Social Work* 1234.

<sup>2</sup> For example see S. Osbourne, "Woman who forced pensioner into modern slavery for four years is jailed", *The Independent*, 30<sup>th</sup> August 2019, Available at: <https://www.independent.co.uk/news/uk/crime/modern-slavery-woman-forced-elderly-victim-chingford-met-police-a9085701.html> (accessed 12 May 2020); D. Hall, "Police appeal for information after pensioner is attacked and robbed", *Daily Record*, 26 November 2019. Available at: <https://www.dailyrecord.co.uk/news/local-news/police-appeal-information-after-pensioner-20964372> (accessed 12 May 2020)

<sup>3</sup> For example, the *Daily Express* launched their 'crusade' to make elder abuse a recognised offence in 2018, see G. Sheldrick, "We lead fight to protect this generation", *Daily Express*, 7 June 2018. Available at: <https://www.express.co.uk/news/uk/970576/elderly-abuse-campaign-minister-for-older-people> (accessed 12 May 2020) and Action on Elder Abuse (UK wide) have been campaigning to make elder abuse a standalone offence or part of the hate crime framework of offences, see Action on Elder Abuse, 'Criminalisation', Action on Elder Abuse. Available at: <https://www.elderabuse.org.uk/pages/category/criminalisation>.

## Introducing specific offence(s) of elder abuse

Several charities, politicians and policy-makers<sup>4</sup> have called for the introduction of one or more new 'elder abuse' offences and this approach is currently under consultation by the Scottish Parliament; a similar discussion is ongoing in England and Wales<sup>5</sup>.

One initial caveat is necessary: despite the ubiquitous use of the terms older, elderly and elder abuse, there is no shared agreement about the definitions of these terms. Across academic research, law and policy, the terms older, old, elder and elderly are used variably to describe those aged 50 and over, 55 and over, 60 and over and 65 and over<sup>6</sup>. Moreover, elder abuse is a relatively new field of inquiry meaning "standardised terminology is yet to emerge"<sup>7</sup> and there is no agreed definition of elder abuse. Some definitions include intentional or unintentional physical, psychological or financial abuse of an older person<sup>8</sup> some include sexual abuse, but others do not<sup>9</sup>. Some definitions are limited to particular relationships, for example family members and carers whereas others include crimes by neighbours, friends, strangers and acquaintances<sup>10</sup>. This continuous expansion of the concept has led to the term being used as a catch-all for all crimes against the elderly<sup>11</sup>, ultimately undermining any potential value of term. As Brandl and Raymond<sup>12</sup> point out, grouping together these varying contexts and dynamics of abuse as a single collective issue is problematic whilst Desmarais and Reeves<sup>13</sup> argue the grouping together has led to an "overemphasis on types of abuse and perpetrators unique to elders" disregarding abuse occurring by partners. This is more troubling given the evidence, which indicates that the majority of violence and abuse experienced by older people is perpetrated by partners or other family members<sup>14</sup> and therefore falls within the definition of domestic abuse adopted by the current Government. The concept has been further criticised for obscuring a comprehensive analysis and

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<sup>4</sup> Ibid Sheldrick and Action on Elder abuse (n3) and see House of Commons Hansard, *Elder Abuse* (UK Parliament, 2018), House of Commons, Vol 648. Available at: <https://hansard.parliament.uk/commons/2018-10-23/debates/9F4C4518-8A1E-446C-B0F4-7B48ED96CAE4/ElderAbuse> (accessed 12 May 2020).

<sup>5</sup> *Daily Express* and Action on Elder Abuse (n3).

<sup>6</sup> See H. Bows, *Sexual violence against older people*, 1<sup>st</sup> edn (Oxon: Routledge, 2019) for a review of how the different terms have been used and the varying starting points for older age.

<sup>7</sup> A.W. Fox, "Elder abuse" (2012) 2 *Medicine, Science and the Law* 128.

<sup>8</sup> World Health Organisation, *Ageing and life-course: Elder Abuse*. Available at: [https://www.who.int/ageing/projects/elder\\_abuse/en/](https://www.who.int/ageing/projects/elder_abuse/en/).

<sup>9</sup> Bows (n6).

<sup>10</sup> See for example Action on Elder abuse, "New Definition of Abuse", (London: Action on Elder Abuse, 1995)

<sup>11</sup> G.J. Anetzberger, "An Update on the Nature and Scope of Elder Abuse", *American Society on Aging*. Available at: <https://www.asaging.org/blog/update-nature-and-scope-elder-abuse>.

<sup>12</sup> B. Brandl and J. Raymond, "Policy implications of recognizing that caregiver stress is not the primary cause of elder abuse" (2012) 36(3) *Generations*, 32.

<sup>13</sup> S.L. Desmarais and K. A. Reeves, "Gray, black, and blue: The state of research and intervention for intimate partner abuse among elders" (2007) 25(3) *Behavioral Science and the Law* 377.

<sup>14</sup> For useful summaries of the literature see N.A. Kohn, "Elder (in) justice: A critique of the criminalization of elder abuse" (2012) 49 *Am. Crim. L. Rev.* 1 and J.R. Harbison, *Contesting Elder Abuse and Neglect: Ageism, Risk, and the Rhetoric of Rights in the Mistreatment of Older People* (Vancouver: UBC Press, 2016).

understanding of violence and abuse across the life course by “bracketing off”<sup>15</sup> violence and abuse of older people as a separate category, despite the available evidence indicating that it is not a problem of age, but rather of gender<sup>16</sup>. Legal scholars in the USA<sup>17</sup> have criticised some of the efforts by elder abuse advocates which have “tended to try to transform elder abuse into a societal concern by emphasizing difference, not sameness. That is, advocates have tried to portray elder abuse as a societal ill by treating elder abuse as something different in character from parallel behavior directed at non-elderly or non-vulnerable adults”. It has therefore been argued that we should move on from using the term “elder abuse” because it suggests that the abuse of older people is somehow different to the abuse of others when in fact this is not supported by most research<sup>18</sup>.

Despite the lack of clarity about the meaning of elder abuse and the widespread criticisms of the concept, it is a pervasive term. In a recent House of Commons debate<sup>19</sup>, several Members of Parliament discussed the problem of ‘elder abuse’ without ever establishing what it was they actually meant by this term. Some of the discussion focused on ‘elder abuse’ in care homes, whilst other MPs were concerned about abuse by carers in the community, in older people’s homes, whilst others focused on financial exploitation and fraud by strangers and organised crime groups<sup>20</sup>. This reflects broader operationalisations of ‘elder abuse’. In England and Wales, the lack of a legal definition and specific offence(s) of elder abuse mean there are few cases to illustrate the types of behaviour that may be informally considered ‘elder abuse’. However in a recent case -*R. v Strong (Claire Marylouise)*<sup>21</sup> involving an appeal against a sentence for conviction under s.44 of the Mental Capacity Act (2005)<sup>22</sup> - the keyword ‘elder abuse’ was used to describe the case which includes physical abuse of elderly residents involving poking a victim in the face, taking photographs of intimate parts of a victim and other similar humiliating acts. Similar cases involving carers abusing residents in care homes have been described as ‘elder abuse’ by campaign groups and the media<sup>23</sup>. These conceptual and definitional inconsistencies provide an unstable basis for the introduction of a crime of elder abuse.

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<sup>15</sup> A. Holt and P. C. Shon, “Exploring fatal and non-fatal violence against parents: Challenging the orthodoxy of abused adolescent perpetrators” (2016) 62 International Journal of Offender Therapy and Comparative Criminology 915.

<sup>16</sup> Kohn (n14).

<sup>17</sup> Kohn (n14) at 17.

<sup>18</sup> Bows (n6).

<sup>19</sup> House of Commons Hansard (n4).

<sup>20</sup> House of Commons Hansard (n4).

<sup>21</sup> [2014] EWCA Crim 2744.

<sup>22</sup> Ill-treatment or neglect of a person who lacks capacity.

<sup>23</sup> See for example BBC News, “Carer pleads guilty to three counts of wilful neglect” [bbc.co.uk https://www.bbc.co.uk/news/av/uk-england-dorset-45496877/carers-pleads-guilty-to-three-counts-of-wilful-neglect](https://www.bbc.co.uk/news/av/uk-england-dorset-45496877/carers-pleads-guilty-to-three-counts-of-wilful-neglect) (accessed 12 May 2020).

### *Arguments for a new offence*

There is currently no specific statutory or common law offence of elder abuse in England and Wales. Instead, similar to child abuse and abuse of adults more generally, the various forms of violence and abuse are covered by more general criminal offences. Over the last decade, several arguments have been put forward to make elder abuse a specific criminal offence<sup>24</sup> which fall broadly into two categories: inadequate process arguments; and symbolic benefit arguments.

### Inadequacies in criminal procedure

Several supporters of a criminal offence of elder abuse cite inadequacies in the justice system as a key reason for introducing new offences. For example, Action on Elder Abuse describe three key issues which they feel justify the need for reform: (1) existing laws to protect older people from abuse and prosecute perpetrators are not strong enough; (2) abuse in care settings is not being adequately dealt with; and (3) the current Criminal Justice System is not fit for purpose<sup>25</sup>.

Several of these arguments have also underpinned discussions by policy makers and MPs. For example, in a discussion in the House of Commons, Giles Watling MP argued for a statutory definition of a crime against an older person and specific elder-protecting legislation to be introduced, describing elder abuse as an “appalling failure of justice” based on a “lax approach to punishment” which fails to deter abusers and refers to a justice gap in relation to the conviction rates for abuse of older people compared with crimes against protected groups under hate crime laws and domestic abuse<sup>26</sup>.

While limited, the emerging research on crimes against older people suggests prosecution and convictions may be lower than younger groups. Although using data which cannot be directly compared, Action on Elder Abuse examined estimated prevalence rates of abuse cases for victims aged 65 years or over with the conviction rate and found that only 0.7% of cases resulted in a conviction<sup>27</sup>. A recent study in Northern Ireland examined outcomes (criminal sanctions) in police recorded criminal cases involving victims aged 55 or over compared with victims aged 20 to 54 years and found a strong negative correlation between age and outcome rate over the period 2007/08 to 2017/18<sup>28</sup>.

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<sup>24</sup> For example, see *Daily Express* and Action on Elder Abuse (n3) and House of Commons Hansard (n4).

<sup>25</sup> See Action on Elder Abuse, *An offence of elder abuse*. Available at: <https://www.elderabuse.org.uk/the-need-for-an-aggravated-offence-of-elder-abuse>.

<sup>26</sup> See House of Commons Hansard (n4) at 251.

<sup>27</sup> However, it is widely accepted that interpersonal crimes are severely underreported and that this may be magnified for older people – see Bows (n6).

<sup>28</sup> K.J. Brown and F. Gordon, “Older victims of crime: Vulnerability, resilience and access to procedural justice” (2019) 25(2) *International Review of Victimology*, 201.

However, rather than pointing towards problems with the existing law, the developing research instead indicates a combination of evidential and procedural issues inhibiting access to justice, in particular the reluctance of older people to engage with the criminal justice system due to fears about the process, including giving evidence in court, and the longer-term implications of pursuing a case (particularly where the offender was a family member)<sup>29</sup>. There are also concerns that cases involving older complainants are inappropriately diverted away from the criminal justice system. Action on Elder Abuse Scotland highlight the tendency for cases of 'elder abuse' to be dealt with as safeguarding issues; for example in 2017, out of 28,187 adult protection cases involving an older person in England and Wales, only 12% were referred by the police to the Crown Prosecution Service<sup>30</sup>. These concerns have been raised elsewhere in the UK. For example, Wydall and colleagues argue that:

“there is a risk of diverting older people out of the domestic abuse support framework and into a welfare-centric approach, thereby reducing the ability to use civil and criminal justice options.”<sup>31</sup>

Other research indicates that in some cases involving older complainants, physical or cognitive health issues may make it difficult for them to give evidence, which can be detrimental to violence/abuse cases where complainant testimony is often the primary source of evidence<sup>32</sup>. They may, for example, have difficulty recalling the details of the incident and/or offender. However, Brown and Gordon<sup>33</sup> point out that there are numerous measures available to criminal justice agencies, such as police body worn camera evidence, video testimony and intermediaries which can support victims to give their evidence and alleviate some of these problems. Brown and Gordon's research has found that these are not well used in cases involving older complainants and the perceived, or actual, evidential difficulties may result in practitioner reluctance to continue a case. Similarly, a recent joint inspection of police and prosecution practice in England and Wales in relation to older victims of crime found that policies to support victims and enable the collection of importance evidence were often not applied<sup>34</sup>. Thus, it is not clear that the substantive law is the problem

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<sup>29</sup> Ibid.

<sup>30</sup> Action on Elder Abuse, “Prosecution of ‘Elder Abuse’” Submission From Action on Elder Abuse Scotland”. Available at: [https://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/EA-Action.pdf](https://www.parliament.scot/S5_JusticeCommittee/Inquiries/EA-Action.pdf) (accessed 12 May 2020).

<sup>31</sup> S. Wydall, A. Clarke, J. Williams and R. Zerk, “Domestic abuse and elder abuse in Wales: A tale of two initiatives” (2018) 48(4) British Journal of Social Work 962, at 968.

<sup>32</sup> Brown and Gordon (n28).

<sup>33</sup> Brown and Gordon (n28).

<sup>34</sup> Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services and HM Crown Prosecution Service Inspectorate, “The Poor Relation: The police and CPS response to crimes against older people” (Justice Inspectorates 2019) available at: <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/crimes-against-older-people.pdf> (Accessed 20 March 2020).

but rather the surrounding policies and procedures involved in investigation and prosecuting offences.

Many of these concerns are not unique to older victims and influence engagement with the Criminal Justice System for many (younger) victims of crime, particularly in cases involving interpersonal abuse and violence<sup>35</sup> and hence do not, in themselves, explain the lower prosecution and conviction outcomes for reported cases involving older victims. Although the law is commonly perceived as a “socially acceptable means of dealing with phenomena such as violence and abuse” and, outside of the UK, “is one of the methods policy makers use to try and solve the problem of ‘elder abuse’ and neglect”<sup>36</sup> it is not currently clear that more criminal offences would address the evidential and procedural issues that have been identified as inhibiting prosecutions and convictions in reported cases of violence and abuse of older people.

#### *International approaches to criminalising elder abuse*

Very few jurisdictions have implemented specific ‘elder abuse’ criminal offences; however, states in the USA has introduced specific laws criminalising ‘elder abuse’<sup>37</sup>. The overall benefit of specific ‘elder abuse’ laws has been questioned by scholars, who have pointed out that many of these laws have duplicated existing criminal provisions that do not distinguish among victims based on age and, as a result, effectively “create new penalties for behaviour that was already criminal and could have been prosecuted under existing criminal laws”<sup>38</sup>. Furthermore, even where specific ‘elder abuse’ legislation is well established, there is evidence that it is often not applied well and that it is ineffective in addressing the roots of ‘elder abuse’. For example, California has specific ‘elder abuse’ offences<sup>39</sup> and is often relied on by campaigners and supporters of reform as an example model for the UK to adopt<sup>40</sup>. However, the evidence on how useful the legislation has been is contested. A recent NBC 7 investigation into ‘elder abuse’ reports that around 4,470 cases of ‘elder abuse’ were

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<sup>35</sup> See A. Robinson and D. Cook, “Understanding victim retraction in cases of domestic violence: specialist courts, government policy, and victim-centred justice” (2006) 9(2) Contemporary Justice Review, 189 and M. Dawson and R. Dinovitzer, “Victim cooperation and the prosecution of domestic violence in a specialized court” (2001) 18(3) Justice Quarterly, 593.

<sup>36</sup> I. Doron, S. Alon and N. Offir, “Time for Policy: Legislative Response to Elder Abuse and Neglect in Israel” (2004) 16(4) Journal of Elder Abuse & Neglect, 63, at 65.

<sup>37</sup> For a review of legislative approaches in different countries see Department of Justice Canada, *Legal Definitions of ‘elder abuse’ and Neglect*, (Department of Justice Canada, 2009), [https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/elder-aines/def/elder\\_abuse-eng.pdf](https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/elder-aines/def/elder_abuse-eng.pdf) (Accessed 20 March 2020).

<sup>38</sup> Kohn (n14).

<sup>39</sup> California Penal Code Section 368.

<sup>40</sup> See Action on Elder Abuse (n30).

reported to the San Diego Police Department since 2010 and the majority of these remain 'open' (rather than solved/prosecuted) cases<sup>41</sup>. A specialist attorney is quoted as stating:

"Generally speaking, elderly people don't make the best witnesses. They perhaps have some level of dementia or memory impairment. And frequently it's a 'he said, she said' situation. So, it becomes very difficult to present those cases when you don't have any hard and fast evidence."

Ulrey<sup>42</sup> identifies a combination of evidential and procedural problems inhibiting prosecution and convictions for 'elder abuse', despite the introduction of dedicated 'elder abuse' legislation. These include a lack of awareness among criminal justice agencies and wider society and a lack of police and prosecutor confidence using the statutes. Additionally, a lack of resources to investigate cases and, in some cases, victim capacity and cognitive impairment, also hinder the utility of specific offences. Davidson<sup>43</sup> similarly agrees that despite the introduction of specific offences and positive prosecution policies, the rates of prosecutions for 'elder abuse' in the USA remain low. Davidson also cites limited resources as an explanation for this as well as the nature of 'elder abuse' which is, in most cases, domestic abuse occurring in the victim's home and perpetrated by a spouse or family member, resulting in low levels of reporting and detection. In other jurisdictions such as Canada, lawyers have questioned why existing legal provisions are not being used in cases involving older adults and have suggested that the issues lie in the attitudes of professionals and structural barriers of the criminal justice institutions, rather than in the law itself<sup>44</sup>.

It would appear, therefore, that it is not a lack of relevant substantive law (which in fact already exists) which is causing the low prosecutions and conviction rates for violence and abuse against older people, but rather, broader criminal justice procedures and policies and evidential difficulties.

### Symbolic arguments

Several supporters of a new elder abuse law have argued that criminalisation would increase political and public awareness of elder abuse and change perceptions of justice and therefore has an expressive function which justifies the introduction of new offences<sup>45</sup>. These beliefs

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<sup>41</sup> NBC San Diego, "Elder Abuse Cases Likely to Remain 'Open' Investigations in San Diego County" (*NBC San Diego Online*, 6<sup>th</sup> October 2019) <https://www.nbcsandiego.com/news/local/elder-abuse-continues-to-plague-san-diego-cases-court-investigations/1966124/> [Accessed 20 March 2020].

<sup>42</sup> P. Ulrey, "Confusion on the Front Lines: The Response of Law Enforcement and Prosecutors to Cases of Elder Abuse" (King County Prosecutor's Office, Seattle: Washington, 2016) [https://acl.gov/sites/default/files/programs/2016-09/Ulrey\\_White\\_Paper.pdf](https://acl.gov/sites/default/files/programs/2016-09/Ulrey_White_Paper.pdf) [Accessed 20 March 2020].

<sup>43</sup> M.J. Davidson, "Governmental responses to elder abuse and neglect in nursing homes: the criminal justice system and the civil false claims act" (2004) 12 *Elder L.J.*, 327.

<sup>44</sup> Harbison (n14).

<sup>45</sup> For example, Action on Elder Abuse (n30).



are supported by some legal scholars in the USA<sup>46</sup>, who have noted the potential expressive benefits of criminalising and prosecuting elder abuse, including sending powerful messages about society's attitudes towards abuse and raising the social value of victims, countering harmful stereotypes about old age and older adults (ageism).

The expressive function of the law is widely debated, and a comprehensive review of these debates is not possible in this paper<sup>47</sup>. The law is generally viewed as one driver of social change, although the relationship between legislation and social attitudes is reciprocal rather than unilateral, and thus the law can sometimes reflect social attitudes rather than shaping them. It is broadly accepted that the law alone does not result in cultural change, but rather it is people that change culture<sup>48</sup>. Although the law may send messages that certain behaviours are not accepted within a particular society, there is little agreement about whether criminal law is an effective or suitable mechanism for transforming an "unjust society into a just one"<sup>49</sup>. A change in the law must be supported with public campaigns, training for professionals and dedicated resources for investigating the new offences in order to be effective. In the context of elder abuse, this is to some extent evidenced in the USA context where, as described above, legal scholars<sup>50</sup> have raised concerns that the successive elder abuse laws have failed to bring about the kind of change reformers had hoped for, largely due to a lack of accompanying training, campaigns and targeted awareness raising.

In addition to the doubts about whether new criminal offences alone can create the sort of change that advocates are hoping for, legal commentators have cautioned that sometimes the introduction of new crimes can actually be counterproductive in achieving the underlying objectives. Bilz and Nadler<sup>51</sup> acknowledge that legal regulation can increase or decrease activities directly, for example as a deterrent through fear of sanctions, or indirectly through changing attitudes about regulated behaviours. However, they argue that although the indirect path may be the most efficient one, it is not guaranteed and can often have

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<sup>46</sup> For example, Kohn (n14) has pointed out that the expressive function of making elder abuse a crime and subsequent prosecutions may help to combat societal acceptance of abuse of older people, sending a powerful message about not only the attitude towards this abuse but also the social value of victims, but she cautions that the existing legal approaches across the USA have failed to do this.

<sup>47</sup> See for example C. Sustain, "On the Expressive Function of Law" (1996) 144 U Pa L Rev 2021. See also J. Waldron, *The Harm of Hate Speech* (Harvard University Press 2012) at 108-9.

<sup>48</sup> K. Jenkins, "Can the law change culture?" (Prevention Policy and Practice: Preventing Violence Against Women VicHealth Conference 14-15 July 2015). Available at: <https://www.vichealth.vic.gov.au/-/media/ResourceCentre/video/VH-Conference-2015-Kate-Jenkins.pdf?la=en&hash=8595818817ED7F93C38F2345E3D232911D3A4C39> (accessed 12 May 2020).

<sup>49</sup> G. Mason, "The symbolic purpose of hate crime law: Ideal victims and emotion" (2014) 18(1) *Theoretical Criminology*, 75, at 87.

<sup>50</sup> Ulrey (n42) and Kohn (n14).

<sup>51</sup> K. Bilz and J. Nadler, "Law, moral attitudes, and behavioral change" in Eyal Zamir and Doron Teichman (eds), *The Oxford handbook of Behavioral Economics and the Law* (Oxford: Oxford University Press 2014).

unintended and perverse effects, including backlashes<sup>52</sup>. In the context of elder abuse, it has been argued that “when age or age-related characteristics trigger new statutory crimes”<sup>53</sup> these are typically paternalistic in nature and have undermined the autonomy of abuse victims. Consequently, such laws have effectively promoted stereotypes about older adults (i.e. they are assumed to be senile, incapable of making their own decisions or looking after themselves and are thus automatically in need of specific legal protections once they reach a certain age). Many of these laws therefore serve to restrict the rights of older people, rather than protect them, and reinforce damaging stereotypes and attitudes that contribute to the problem of abuse against older people. Writing some 25 years ago, Macolini<sup>54</sup> questioned the logic of creating a “distinct form of intrafamilial violence based predominantly upon the age of the victim” and argued that statutes which created special protections for older adults were themselves ageist, as the “alleged need for heightened societal attention is based on age rather than on physical or cognitive limitations. In fact, advanced age appears to have been equated with dependency and disability within some statutes”<sup>55</sup> which is inherently ageist. There is concern, therefore, that the symbolic effects can be overwhelmingly negative and harmful.

### **Extending hate crime frameworks to incorporate older age**

The second proposal put forward by campaign groups and MPs<sup>56</sup>, and currently under consideration by the Law Commission in England and Wales<sup>57</sup>, is to extend the existing hate crime legislation to include older age.

There is currently no agreed definition of hate crime, however the term is commonly used in policy and scholarship to describe and distinguish violence or other crimes against individuals based on prejudice, hostility or hatred based on one or more of the victim’s identity characteristics. Central to the various definitions and conceptualisations of hate crime is the

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<sup>52</sup> See also A. R. Flores and S. Barclay, “Backlash, Consensus, Legitimacy, or Polarization: The Effect of Same-Sex Marriage Policy on Mass Attitudes” (2015) 69 Political Research Quarterly 43 for an examination of the potential effects of law and policy reform in the context of same-sex marriage.

<sup>53</sup> Kohn (n14) at 22.

<sup>54</sup> R.M. Macolini, “Elder abuse policy: Considerations in research and legislation” (1995) 13 Behavioral Sciences & the Law 349, at 350.

<sup>55</sup> Ibid at 350.

<sup>56</sup> For example, see Action on Elder Abuse, *Campaigning*. Available at: <https://www.elderabuse.org.uk/campaigning> (accessed 12 May 2020).

<sup>57</sup> Northern Ireland and Scotland are also considering whether to include age as a protected characteristic in hate crime legislation, see Hate Crime Legislation Review in Northern Ireland: Independent Review, led by Judge Desmond Marrinan available at: <https://www.hatecrimereviewni.org.uk> and Scottish Government *Consultation on amending Scottish hate crime legislation: analysis of responses* (27 June 2019). Available at: <https://www.gov.scot/publications/consultation-amending-scottish-hate-crime-legislation-analysis-responses/pages/8/> (accessed 12 May 2020).

targeting of individuals who are members of particular groups, typically marginalised (and sometimes minority) groups<sup>58</sup>.

In England and Wales, several offences can become aggravated if there is evidence of hostility towards the victim based on a protected characteristic. Under ss. 29-32 of the Crime and Disorder Act 1998 there are currently eleven 'basic' offences which can be racially or religiously aggravated. The aggravated offences under the Act include assault, criminal damage, harassment, stalking and various public order offences. In effect, this converts the basic offence into an aggravated offence where at the time of the offence, or immediately before or after, the offender demonstrates hostility towards the victim based on perceived or actual membership of a racial or religious group, or where the offence is motivated wholly or partly by hostility towards members of that group.

Separately, ss.145 and 146 of the CJA provide sentencing provisions which stipulate that a penalty must be enhanced where the defendant is convicted of a crime aggravated by racial, religious, sexual orientation, disability or transgender hostility (the protected characteristics). Unlike the specific racial and religiously aggravated offences described above, this sentencing provision is applicable to all crimes and extends beyond racial and religious hostility. Finally, there are a set of offences under sections 17- 29 Public Order Act 1986 related to stirring up of racial and religious hatred, and hatred based upon sexual orientation.

Although age is not specifically included in any of the existing hate crime laws, older people may be captured under hate-crime legislation if they have one or more of the protected characteristics, for example ethnicity or a disability. Many examples of conduct which the supporters of a hate crime extension seek to criminalise are arguably covered by the existing disability hate crime which academics, lawyers and policy makers suggest is the reason the victim has been targeted, rather than their age<sup>59</sup>. In a recent study on crimes and abuse of older people in Wales, a Crown Prosecution Officer commented that:

“There’s a huge crossover between elder abuse and disability hate crime. Quite often when we look at issues that are flagged up as elder abuse the reason that person has been targeted is not necessarily because what it says on birth certificate but because they have a condition physical mental that runs as vulnerable. It maybe that that is a

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<sup>58</sup> For a useful review of definitions and legislative approaches see J. Chalmers and F. Leverick, “A Comparative Analysis of Hate Crime Legislation. A Report to the Hate Crime Legislation Review” (Glasgow: University of Glasgow 2017). Available at: [https://consult.gov.scot/hate-crime/independent-review-of-hate-crime-legislation/supporting\\_documents/495517\\_APPENDIX%20%20ACADEMIC%20REPORT.pdf](https://consult.gov.scot/hate-crime/independent-review-of-hate-crime-legislation/supporting_documents/495517_APPENDIX%20%20ACADEMIC%20REPORT.pdf) (accessed 12 May 2020).

<sup>59</sup> The available evidence indicates that physical and/or psychological disabilities are major risk factors for elder abuse alongside gender, and it is these vulnerabilities rather than age which explain interpersonal violence in later life. See M. Lachs and K. Pillemer, “Elder abuse” (2015) 373 New England Journal of Medicine 1947 for a useful review.

age-related condition but the reason they are being targeted is because they have that disability or perceived disability and not necessarily because of their age”.<sup>60</sup>

However, research has found that for disability hate crimes the *nature* of offending is typically different to that of other hate crimes; theft and mistreatment or neglect are more common in disability hate crimes whereas violence against the person is more common for racial or religious hate crime<sup>61</sup>. This makes the task of proving the all-important hostility element challenging; simply taking advantage of someone who has a disability is insufficient in most cases<sup>62</sup>. Similarly, taking advantage of someone simply because they are old does not fit within the scope of current hate crime legislation, nor its intended scope.

#### *Arguments for including older age as a protected characteristic*

In England and Wales, MPs and campaign groups have argued that hate crime laws should be extended to include older age<sup>63</sup> and public opinion appears to support this: a recent survey of around 3,000 people indicates broad support for making elder abuse an aggravated offence, with 95% of people supporting the introduction of a specific offence<sup>64</sup>. Supporters of the reform to include age have argued that the benefits include tougher sentences<sup>65</sup> by applying the hate crime uplift. However, several legal and elder abuse scholars have pointed out that non-custodial (and in fact, non-criminal justice responses) are often more beneficial in cases of abuse<sup>66</sup> and that increasing conviction rates should not be the primary aim for legal reform<sup>67</sup>. Success should not be assessed solely by the application, or length of, custodial sentence.

Although excluded from the legislation, age-related hate crime can be included in the operationalisation of hate crime policy. College of Policing guidance encourages police forces to record other forms of targeted hostility (outside of the protected characteristics) as hate

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<sup>60</sup> S. Wydall, R. Zerk and J. Newman, “Crimes against, and abuse of, older people in Wales. Access to support and justice: working together” (Aberystwyth, Aberystwyth University and Cardiff: Older People’s Commissioner for Wales 2015) at 60. Available at [http://www.olderpeoplewales.com/Libraries/Uploads/Access\\_to\\_support\\_and\\_justice\\_-\\_working\\_together\\_report.sflb.ashx](http://www.olderpeoplewales.com/Libraries/Uploads/Access_to_support_and_justice_-_working_together_report.sflb.ashx) (accessed 12 May 2020).

<sup>61</sup> M.A. Walters, A. Owusu-Bempah and S. Wiedlitzka, “Hate crime and the “justice gap”: the case for law reform” [2018] 12 Criminal Law Review, 961.

<sup>62</sup> *ibid.*

<sup>63</sup> For example, see House of Commons Hansard (n4) at 253.

<sup>64</sup> Daily Express, “‘Get TOUGH on abusers of the elderly’ New survey shows most Brits want harsher penalties”, [express.co.uk https://www.express.co.uk/news/uk/822728/Elderly-abuse-UK-penalties-cases-aggravated-offence](https://www.express.co.uk/news/uk/822728/Elderly-abuse-UK-penalties-cases-aggravated-offence) (accessed 12 May 2020).

<sup>65</sup> Action on Elder Abuse, ‘Elder Abuse is a crime let’s make it one’. Available at: <https://www.safeguardingadultsyork.org.uk/media/1114/aea-polling-manifesto-2017.pdf> (accessed 12 May 2020).

<sup>66</sup> For example, see Kohn (n14).

<sup>67</sup> W. Larcombe, “Falling rape conviction rates:(Some) feminist aims and measures for rape law” (2011) 19(1) Feminist Legal Studies 27.

crime if there are valid reasons for doing so.<sup>68</sup> This has already been extended to age hate crime by a number of police forces<sup>69</sup>. Similarly, the Crown Prosecution Service flags and monitors crimes against older people alongside the (formally legally) recognised hate crime characteristics<sup>70</sup>.

It has been suggested that (some of the) criminal victimisation of older people shares many of the core elements of hate crimes: for example, there is some evidence that older people are sometimes specifically targeted, particularly through scamming and door-stop fraud<sup>71</sup> and the attacks can cause fear and apprehension within the elderly community<sup>72</sup>. However, there are several important distinctions between elder abuse and targeted criminal offending against older people, and hate crime, which rebut reliance on these as a basis for new hate crimes. These are considered in the following section.

### *Arguments against the creation of age-based hate crime*

The key questions underpinning the proposals to include older age within hate crime frameworks centre on whether violence and abuse of older people is about hostility, whether there is evidence for a need for a new offence(s), how this might affect older victims and whether there are any other justifications for extending the legislation to include (older) age as a protected characteristic.

Some of the core features of hate crime conceptualisations seem at odds with the arguments to extend hate crimes to include older people. First, despite the debates among scholars and professionals about definitions and conceptual understandings of hate crime, one of the key features which is consistent across legal and social scholarship, policy and practice is that hate crime is fundamentally about a targeting of individuals who belong to a marginalised or

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<sup>68</sup> See College of Policing, *Hate Crime Operational Guidance*, (College of Policing 2014). Available at: <https://www.college.police.uk/What-we-do/Support/Equality/Documents/Hate-Crime-Operational-Guidance.pdf> (accessed 12 May 2020) – at the time of writing this article, there is currently a case in the High Court challenging the College of Police policy, see *Miller v. College of Policing* [2020] EWHC 225 (Admin) and reported in I. Lyons, ‘Right to be offended’ does not exist, judge says as court hears police record hate incidents even if there is no evidence’, *The Telegraph*, 20 November 2019. Available at: <https://www.telegraph.co.uk/news/2019/11/20/right-offended-does-not-exist-judge-says-court-hears-police/> (accessed 12 May 2020).

<sup>69</sup> For example, see Bedfordshire Police hate crime statement: Bedfordshire Police, “Age hate crime” (Bedford: Bedfordshire Police). Available at: <https://www.bedfordshire.police.uk/information-and-services/Crime/Hate-crime-and-hate-incidents/Age-hate-crime> (accessed 12 May 2020).

<sup>70</sup> *Crown Prosecution Service, Hate crime and crimes against older people report 2011-2012* (London: CPS, 2013). Available at: <https://www.cps.gov.uk/publication/hate-crime-and-crimes-against-older-people-report-2011-2012> (accessed 12 May 2020).

<sup>71</sup> C. Phillips, “From ‘rogue traders’ to organized crime groups: Doorstep fraud of older adults” (2016) 57(3) *British Journal of Criminology* 608.

<sup>72</sup> H.G. Hull, “The not-so-golden years: why hate crime legislation is failing a vulnerable aging population” (2009) *Mich. St. L. Rev.*, 387.

oppressed group, based on prejudice towards or hatred of that particular group<sup>73</sup>. Hate crime is thus characterised by a targeting of difference – the individual victim is not targeted just because of who they are, but because of who and what they represent, and in this sense the offence can be considered not only against the victim, but the broader community the victim represents<sup>74</sup>. These features are not generally observed in relation to older people. They do not represent difference in the way that minority groups or communities do; older age is a group that the vast majority will become members of, regardless of our other identities. In fact, globally, there are now more people aged 65 and over than there are aged 5 and under<sup>75</sup>. Older age is thus not a feature of difference, but similarity, which cuts across all other communities and social identities.

Furthermore, there is no reliable evidence that older people are specifically targeted because of hatred and hostility towards older people as a community, which are key elements of both hate crime conceptualisations and existing hate crime offences<sup>76</sup>. One study which suggested older people are specifically targeted in hate crimes was conducted by Iparraguirre<sup>77</sup>, who used British Crime Survey data<sup>78</sup> to argue that *age-based* hate crime is more prevalent than *gender-motivated* hate crime. However, this may be seen as a misrepresentation of the data. The Home Office report is based on the British Crime Surveys 2009/10 and 2010/11 which included a specific section on hate crime. The section of the survey relied on by Iparraguirre involved two primary questions (following a screening question) about whether the victim perceived the offender to be racially motivated (question 1) and/or whether they felt the offender had been motivated by the offender's attitude towards the victim's religion, sexuality, age, gender or disability (question 2). For respondents answering 'don't know' to either question, a further follow-up question asks whether there was anything about the incident that made the victim think it might have been motivated by any of these factors. The results showed that, overall, about 0.3% of people aged 16 and over perceived they were victims of age-related hate crime compared to 0.2% of victims who thought they were victims of gender-related hate crime. However, the Home Office warns that "estimates of age-motivated hate crime in particular should be treated with caution, as it is possible, for example, that older victims who may be targeted for their age-related vulnerability, are

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<sup>73</sup> H. Mason-Bish, 'Conceptual issues in the construction of disability hate crime'. In: Roulstone, Alan and Mason-Bish, Hannah (eds.) *Disability, hate crime and violence* (Oxon: Routledge, 2012).

<sup>74</sup> Ibid.

<sup>75</sup> National Geographic, "There are now more people over age 65 than under five—what that means" *National Geographic* 14 July 2019. Available at: <https://www.nationalgeographic.co.uk/history-and-civilisation201907there-are-now-more-people-over-age-65-under-five-what-means> (accessed 12 May 2020).

<sup>76</sup> Confirmed in Miller (n68).

<sup>77</sup> J. Iparraguirre, "Hate crime against older people in England and Wales—an econometric enquiry" (2014) 16(3) *The Journal of Adult Protection* 152.

<sup>78</sup> K. Smith, D. Lader, J. Hoare and I. Lau, *Hate crime, cyber security and the experience of crime among children: Findings from the 2010/11 British Crime Survey: Supplementary Volume 3 to Crime in England and Wales 2010/11* (London: Home Office 2012).

answering that the incident was motivated by the offender's attitude towards their age rather than this vulnerability"<sup>79</sup>. They further state that

“the youngest and oldest age groups were more likely to say they thought they had been a victim of age-motivated hate crime than other age groups (0.7% of those aged 16–24 and 0.6% of those aged 75 and over were victims of age-motivated hate crimes compared with 0.3% of those aged 65–74). This suggests that some people may have misunderstood or misheard the question and mistakenly be reporting an incident as age-motivated”.<sup>80</sup>

Given these concerns about misinterpretations of the questions and the methodological limitations of the British Crime Survey, the analysis and findings by Iparraguirre may be unreliable. Consequently, making data-based claims about the prevalence of age-based hate crime is questionable. Furthermore, although there is limited research exploring older people's attitudes and beliefs around their actual or perceived victimisation, some small exploratory projects have indicated that older victims do not believe their victimisation was because of hostility or hatred of older people<sup>81</sup>. Similarly, professionals working in the criminal justice system have warned that the introduction of age-based hate crimes would be futile on the basis that few cases involve hatred or hostility and prosecutions would therefore be infrequent<sup>82</sup>. A further problem can be identified here: proving the motivations behind the commission of the offence. This was noted by the Law Society in Scotland, who have pointed out the difficulty with incorporating age into the hate crime framework centres on proving the motivation for the offence was hostility based on age, rather than vulnerability.

It has been argued by some that that while hostility towards older people based on their age may not be common, the deliberate targeting of older people because they are (actually or perceived to be) vulnerable provides separate sufficient justification for the inclusion of older age as a protected characteristic. For example, Action on Elder Abuse concede that few older people are targeted because of hatred/hostility but argue that perpetrators deliberately choose victims because of their perceived vulnerability and that this deliberate targeting is akin to the targeting of the groups currently protected by hate crime laws, where it will be

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<sup>79</sup> Ibid at 25.

<sup>80</sup> Ibid at 25.

<sup>81</sup> H. Raine, “Understanding Hate Crime in North Yorkshire and the City of York” (North Yorkshire: Office of the Police and Crime Commissioner for North Yorkshire 2015). Available at: <https://www.northyorkshire-pfcc.gov.uk/content/uploads/2016/09/Hate-Crime-Report-2015-Final-Version-for-Public.pdf>. However, it is worth noting that older people in this study did state they felt people were aggressive towards them because of their age.

<sup>82</sup> A. Grant, “Police chiefs have spoken out against creating a new hate crime covering elderly people” *The Herald*, 25 February 2019. Available at: <https://www.heraldscotland.com/news/17458032.police-chiefs-argue-against-new-hate-crime-covering-elderly/> (accessed 12 May 2020).

taken into consideration as an aggravating factor during sentencing<sup>83</sup>. There are several assumptions underpinning the arguments to include older age based on vulnerability: that older people are routinely targeted because of perceived/actual vulnerability related to their age (conflating vulnerability with high risk); that hate crime as a concept can, and should, be widened in scope to include vulnerability (demonstrated or motivated by); and that older victims would benefit from this widening. These will be dealt with in turn.

There is limited evidence that older people are, in general, routinely targeted as victims of crime and are therefore 'vulnerable' to victimisation as is claimed by those in support of extending the legislation; national data shows older people experience less personal crime (violence and property) than younger groups<sup>84</sup>. This is also true of economic crime: national data indicates older people experience fraud less frequently than younger groups and that those aged 75 and over experience the least fraud of all age groups<sup>85</sup>. For example, mass marketing fraud (emails, texts, letters or phone calls from individuals or companies requesting money) is experienced most frequently by those aged 25-44 – those aged 75 and over are the least likely to experience such communications. Several studies outside of the UK have also found that younger people are more at risk of fraud overall than older people<sup>86</sup>. Consequently, there is currently insufficient evidence that older people are, in general, being targeted because of actual or perceived vulnerability based specifically on age. There is some limited data that indicates older people may be more likely to be victims of particular types of scams, for example doorstep scams<sup>87</sup>, although the lifestyles of older individuals (at home more and therefore more likely to answer the door) may contribute to this. Doorsteps scams form a small proportion (17%) of all scams, and for people aged 65 and over only 3% of the scams they experience are doorstep crimes, compared with 5% of those aged 18-24, thus the relative risk for older people remains low<sup>88</sup>. Moreover, as most fraud is experienced by

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<sup>83</sup> Action on Elder Abuse, "Should 'elder abuse' be a hate crime?", available at: <https://www.elderabuse.org.uk/should-elder-abuse-be-a-hate-crime> (accessed 20 March 2020).

<sup>84</sup> See Office for National Statistics, *Characteristics of adults who were victims of personal crime (excluding fraud and computer misuse) year ending March 2019*, (London: ONS 2019) available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/adhocs/10794characteristicsofadultswhowerevictimsofpersonalcrimeexcludingfraudandcomputermisuseyearendingmarch2019> (Accessed 20 March 2020).

<sup>85</sup> Statista, *Proportion of adults who were victims of fraud in England and Wales from April 2016 March 2017, by age* (lasted edited 12 December 2019) available at: <https://www.statista.com/statistics/752961/victims-of-fraud-by-age-england-and-wales/> (Accessed 20 March 2020).

<sup>86</sup> For a review see M. Button, C. Lewis and J. Tapley, *Fraud typologies and victims of fraud: Literature Review*, (Portsmouth: University of Portsmouth and London: National Fraud Agency 2009) available at: <https://pdfs.semanticscholar.org/40e7/1ba4d4a45611654278c5d8c762d3a36889fd.pdf> (Accessed 20 March 2020).

<sup>87</sup> Chartered Trading Standards Institute, 'Stand Against Scams', available at: <https://www.tradingstandards.uk/media/documents/policy/research/stand-against-scams-final-9.pdf> (accessed 20 March 2020).

<sup>88</sup> X. Couture and A. Pardoe, "Changing the story on scams: Protecting consumers and increasing reporting" (London: Citizens Advice Bureau 2017) available at: <https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Scams%20report%20-%20final.pdf> (accessed 20 March 2020).



younger people, the (potential) higher rates of victimisation for one particular type of fraud (e.g. scams) does not justify an overall widening of substantive laws based on older age, particularly when the existing fraud legislation already captures these offences. There is compelling evidence that the impacts of fraud, and other offences, may be more severe for (some) older people, including increasing the risk of the victim going into a care home<sup>89</sup>. However, the impacts of crime, including fraud, is variable and it is not universally the case that older people will experience more adverse effects than younger victims. For example, a study commissioned by Citizens Advice Scotland found younger people were twice as likely to feel embarrassed or ashamed about scams as older people<sup>90</sup>. Thus, if age were to be included, it would need to incorporate both young and old in order to accurately capture the groups who are 'vulnerable' to experiencing crime and being specifically targeted. In doing that, however, we essentially include everyone as a potential victim of hate crime and thus there is nothing to distinguish crimes from hate crimes<sup>91</sup>.

Conceptually and operationally, even if older people as a group may be more vulnerable to particular crimes compared with other groups, evidence of a person being targeted because of perceived vulnerability or because they are an easy target is not evidence of hostility, and thus this conduct would not fall within the existing hate crime frameworks<sup>92</sup> even if extended. This is sometimes viewed as a conceptual limitation of hate crime legislation and policy and some scholars<sup>93</sup> have argued that the current identity-based approach to hate crime should be departed from and a broader framework based on a vulnerability<sup>94</sup> approach would ensure a wider range of victims, including those from majority groups, could be included. However, other scholars have cautioned against this<sup>95</sup>. As well as the issues with defining and conceptualising vulnerability discussed in this paper, there are broader concerns that widening the scope of hate and hostility to include vulnerability will essentially dilute the purpose and meaning which underpinned the core objectives for introducing hate crimes<sup>96</sup>. By widening hate crimes to include those deemed vulnerable, the range of victims that could

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<sup>89</sup> Neighbourhood Watch, 'Scams and older people' available at: <https://www.ourwatch.org.uk/crimes-archive/scams-older-people/> (accessed 20 March 2020).

<sup>90</sup> Citizens Advice Scotland, 'Younger Scots twice as likely to feel embarrassed about scams as older people' (2019) available at: <https://www.cas.org.uk/news/younger-scots-twice-likely-feel-embarrassed-about-scams-older-people> (accessed 20 March 2020).

<sup>91</sup> Similar concerns have been raised by see J. Schweppe, "Defining Characteristics and Politicising Victims: A Legal Perspective" (2012) 10(1) *Journal of Hate Studies* 173 who has argued that focusing on identifying characteristics or traits widens the net too far. Using the example of the traditional target of playground bullies, which includes rich, poor, geeky, stupid, fat, thin etc. children, it becomes impossible to draw a line between crime and crime motivated by hate.

<sup>92</sup> Miller (n68).

<sup>93</sup> N. Chakraborti and J. Garland, "Reconceptualizing hate crime victimization through the lens of vulnerability and 'difference'" (2012) 16(4) *Theoretical Criminology*, 499.

<sup>94</sup> A. Roulstone, P. Thomas and S. Balderston, "Between hate and vulnerability: Unpacking the British criminal justice system's construction of disablist hate crime" (2011) 26(3) *Disability & Society* 351.

<sup>95</sup> For a useful overview of arguments in this area see Chalmers and Leverick (n58), page 61 onwards.

<sup>96</sup> J. Jacobs and K. Potter, *Hate Crimes: Criminal Law and Identity Politics* (Oxford: Oxford University Press 1998) at 78.

be included could potentially be so wide that almost everyone can be a victim of hate crime, rendering the legislation meaningless<sup>97</sup> and removing the special status that currently attaches to these crimes and in essence making hate crimes indistinguishable from the more general versions of the offences (for example assault).

Even if the vulnerability model was to be accepted, it does not follow that older people should be inherently perceived as vulnerable (which a specific hate crime characteristic would imply) for a number of reasons analysed in this paper, namely the risk of exacerbating ageist attitudes by positioning older people as inherently vulnerable, obscuring the nature of violence/abuse/crimes against older people by bracketing it off from abuse and crime younger people experience, ignoring the role of other social characteristics which evidence indicates raises the risk of violence, abuse and crime and finally, encouraging paternalistic legal responses to older people which limit, rather than enhance, their rights.

Finally, in the jurisdictions where hate crime laws including older age as a protected characteristic exist, there is limited evidence these laws are being effectively used. New York City<sup>98</sup> and Florida<sup>99</sup>, for example, publishes data annually on police recorded hate crimes against different categories including age. Significantly, the latest data from NYC based on the 2018 hate crime incident reports and arrests reveal there were no age-based hate crime reports or arrests that year. Similarly, in Florida, the latest data (from 2016) shows no reports or arrests for hate crime based on advanced age.

Notwithstanding the issues associated with the concept and operationalisation of vulnerability, victims who are deemed vulnerable are already recognised in existing Sentencing Council Guideline for the offences older people most commonly experience. Many of these specifically refer to older victims as forming one category of ‘vulnerable’ victims. For example, the SC Definitive Guideline for a common assault<sup>100</sup> specifically outlines two aggravating features which would capture older victims of crime: first it creates an aggravating feature where the offence is motivated by, or demonstrating, hostility based on victim’s age and, second, where the perpetrator has deliberately targeted a vulnerable victim. Several recent cases provide examples of these sentencing provisions being applied<sup>101</sup>. For

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<sup>97</sup> N. Hall, *Hate Crime* (Cullompton: Willan Publishing, 2005) and see Schweppe (n91).

<sup>98</sup> New York City Police Department (NYCPD) “Hate Crimes Reports” (New York, NYPD) available at: <https://www1.nyc.gov/site/nypd/stats/reports-analysis/hate-crimes.page> (Accessed 20 March 2020).

<sup>99</sup> Florida Attorney General, “Hate Crimes in Florida January 1, 2016 – December 31, 2016 (Tallahassee, Florida Attorney General 2017) available at: [http://myfloridalegal.com/webfiles.nsf/WF/KMAN-AUHPGP/%24file/2016+Hate+Crimes+Report+\(Final\).pdf](http://myfloridalegal.com/webfiles.nsf/WF/KMAN-AUHPGP/%24file/2016+Hate+Crimes+Report+(Final).pdf) (accessed 20 March 2020).

<sup>100</sup> Crime and Disorder Act 1998 s.39 sentencing guidelines. Available at: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault-definitive-guideline-Web.pdf>.

<sup>101</sup> See *R v Davina Delo, David Joseph Delo* [2016] EWCA Crim 1459; *R v Usher (Walter Robert)* [2012] EWCA Crim 2051.

theft offences<sup>102</sup>, deliberately targeting a victim on the basis of vulnerability is listed as one of the factors that would determine the offence category as high culpability and the (older) age of the victim giving rise to vulnerability features in the sentencing decisions of several recent cases<sup>103</sup>. This is also listed in the SC Definitive Guideline for fraud<sup>104</sup>, which current evidence suggests is the crime older people are most likely to experience<sup>105</sup> and again this is specifically referred to in the sentencing decisions of recent cases<sup>106</sup>. Older people who are assessed as vulnerable are, therefore, already captured by the sentencing criteria for the offences that older people most commonly experience (violence and property offences) and there is limited evidence that a widening of hate crime laws to include older age is required to adequately protect older people.

## Conclusion

Historically, older people have been invisible as victims of crime. They have been viewed as no-risk, or low-risk, for crime, and age has widely been considered a protective factor for both offending and victimisation. Recent empirical research has begun to challenge these assumptions and has highlighted that older people experience a variety of abusive and violent behaviours. Consequently, there has been mounting pressure by campaign groups, older age organisations and charities to recognise and protect older victims, particularly victims of violence and abuse, through legal reform. Two proposals have dominated the discussions: first, the introduction of a specific standalone offence of elder abuse; and second, the expansion of hate crime legislation to include older age as a protected characteristic. Most of the concerns underpinning these calls for reform centre on a lack of political and public awareness of crimes and abuse against older people, low prosecution and conviction rates, and the desire to prevent, and adequately respond, to crimes against older people.

There are a significant number of issues and risks inherent in both of the proposals for legal reform. First, there are conceptual ambiguities concerning elder abuse, the lack of agreed definitions of older/elderly, and the inconsistent use of these terms to refer to different forms and contexts of violence and abuse against older people render any attempts at legal reform impossible. Even if these definitional and conceptual problems could be addressed, there is limited evidence that legal reform through specific criminal offences of elder abuse is required to achieve the intended objectives of increasing prosecutions, improving awareness and driving political attention. Crimes already exist which capture the various forms and

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<sup>102</sup> Theft Act 1968 section 1 sentencing guidelines. Available at: <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/theft-general/>.

<sup>103</sup> See *R v Lewis* [2019] EWCA Crim 2003; *R v Siobhan Perry* [2019] EWCA Crim 1838

<sup>104</sup> Fraud Act 2006 s.1 sentencing guidelines. Available at: <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/fraud/>.

<sup>105</sup> J. Shao, Q. Zhang, Y. Ren, Y. X. Li, and T. Lin, "Why are older adults victims of fraud? Current knowledge and prospects regarding older adults' vulnerability to fraud" (2019) *Journal of Elder Abuse & Neglect* 1.

<sup>106</sup> See for e.g. *R. v Yasin (Ahmed)* [2019] EWCA Crim 1729; *R v Chapman* [2018] EWCA Crim 2539; *R v Collins (Terry)* [2018] EWCA Crim 1713.

contexts captured by the broadest 'elder abuse' definitions, and any introduction of new offences would duplicate these.

The available research indicates that the problems with prosecutions and convictions for abuse of older people centre on procedural and evidential issues rather than deficiencies in substantive law. Although there may be some symbolic advantages to specifically criminalising elder abuse, there are considerable risks associated with introducing laws which separate older people from other groups and contribute to ageist attitudes and stereotypes about older people and result in paternalistic approaches that limit, rather than enhance, older people's rights.

Extending hate crime frameworks to include older age is similarly fraught with difficulties. The core tenets of hate crime – the targeting of an individual based on their perceived or actual membership of a marginalised group based on prejudice or hatred/hostility towards that group – is not observed in crimes against older people. This paper has argued that there is insufficient evidence that older people are a marginalised group in the way that other groups protected by hate crime laws are. Furthermore, there is also insufficient evidence that they are specifically targeted based on hostility or hatred. Moreover, although it has been argued that the (potential) vulnerability of older people to victimisation justifies an extension of hate crime frameworks to include older age as a protected characteristic, the evidence of older people's vulnerability to crime is contested and there are concerns associated with casting older people as inherently vulnerable. Finally, as others<sup>107</sup> have argued, 'just because an offence may fit within our comprehension of what 'hate' might entail does not necessarily mean it is advantageous to include it within hate crime law'. Thus, even if the current hate crime framework could be extended to include older people (perhaps based on vulnerability, notwithstanding the potential problems and risk associated with this approach) it does not necessarily follow that it should be, for the reasons outlined in this paper.

In conclusion, there are a number of valid concerns about the current state of policy and practice in relation to violence, abuse and crimes more generally against older people. Urgent action is needed to address each of these areas, but the current proposals to criminalise elder abuse through a new offence or extend hate crime legislation to include older age as a protected characteristic do not appear to be capable of achieving these goals. Rather, improved use and application of the existing law may be achieved through training, awareness raising and improvements in prevention and victim support policy to address embedded ageism.

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<sup>107</sup> M.A. Walters and J. Tumath, "Gender 'hostility', rape, and the hate crime paradigm" (2014) 77(4) *The Modern Law Review*, 563, at 577.